

Decision 02-08-074

August 22, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own Motion into the operations, practices, and conduct of Vista Group International, Inc. (U-5650), doing business as Vista Communications (Vista), Thomas Coughlin, Chief Executive Officer of Vista, and Philip Bethune, President of Vista, to determine whether they have violated the laws, rules, and regulations governing the manner in which California consumers are switched from one Long Distance carrier to another.

Investigation 99-04-020
(Filed April 22, 1999)

Application for Authority to transfer control of Communications Billing Inc. (U-6020-C) from its current shareholders to Thomas M. Coughlin, Sr. and Philip A. Bethune.

Application 99-09-038
(Filed September 20, 1999)

Regina M. DeAngelis and James McTarnaghan for Communications Billing, Inc., applicant.

David Crocker and Lawrence M. Brenton for Vista Group International, Inc., respondent.

Stephanie Krapf for Pacific Bell, interested party.

Carol Dumond for Consumer Services Division.

**ORDER DENYING REHEARING OF
DECISION (D.) 01-09-017**

I. INTRODUCTION

On April 22, 1999, we instituted an investigation into alleged cramming and slamming activities by Vista Group International, Inc. (“Vista”). Vista is an Ohio corporation certified by Decision (D.) 96-07-051 to do business in California as a switchless reseller. In the investigation, Vista was alleged to have violated Public Utilities Code Sections 702 and 2889.5¹ by failing to adequately supervise its telemarketers, such that thousands of customers switched long distance providers after receiving misleading solicitations and inadequate information about the rates and switching charges. We also investigated whether fines should be imposed pursuant to Sections 2107 and 2108, whether Vista should be ordered to cease and desist from any unlawful operations or pay restitution, and whether Vista’s certificate of public convenience and necessity should be suspended or revoked.

On November 10, 1999, the Assigned Commissioner consolidated this proceeding with Application (A.) 99-09-038, which was filed on September 14, 1999. The investigation proceeding was adjudicatory with a 12-month deadline, whereas the later filed application is ratesetting. On April 6, 2000, pursuant to Section 1701.2(d), we issued D.00-04-032, which extended the 12-month deadline in the consolidated proceeding in order to accommodate the later schedule of the application.

An evidentiary hearing was held on October 18-22, November 15-19, and December 6 and 15, 1999. Vista and the Commission’s Consumer Services Division (“CSD”) filed concurrent opening and closing briefs on January 7 and 14, 2000, respectively.

At the hearing, CSD produced the following evidence against Vista. Vista purchases long distance services from other carriers and does not have its own primary interexchange carrier (“PIC”) code with local exchange companies

¹ Unless otherwise indicated, statutory citations are to the Public Utilities Code.

(“LECs”). Customer data accumulated by LECs regarding Vista appears in the name of the underlying exchange carrier, but underlying carriers are able to separate out any PIC disputes regarding Vista. In 1996, shortly after starting to operate in California, Vista contracted with telemarketing firms to solicit California small business customers for Vista’s long distance services. In 1998, Vista had approximately 67,000 California customers and reported total revenues nationwide of \$40 million with an overall net loss.

During 1997 and 1998, customer complaints about Vista were received from all over the state by the Commission, Vista, the Federal Communications Commission, and the Better Business Bureau of Ohio (“BBB”), where Vista was incorporated. CSD reviewed 133 written complaints against Vista and personally interviewed 122 complaining customers. CSD also received a copy of BBB’s annual report on Vista, which stated that BBB had processed a pattern of complaints alleging that Vista used deceptive selling practices.² In the written complaints, customers alleged that their long distance service was switched to Vista from their chosen carrier without the customer’s knowledge, authorization or consent, and most of the complaining customers state that the telemarketer contacting the customer claimed to represent a company other than Vista, such as Pacific Bell.³ A majority of complaining customers also claimed that the telemarketer offered to consolidate local and long distance charges into one bill, and represented that nothing else would change. Other customers indicated that the telemarketer claimed to be calling to conduct a telephone survey, to obtain billing information, to simplify the company’s billing, or to obtain the best long distance rates available for the customer.

In addition to interviewing virtually all customers who filed written complaints, CSD determined that 10,773 PIC disputes were recorded against Vista

² The BBB report also indicates that the Oregon Attorney General obtained an Assurance of Voluntary Compliance from Vista, and that Oregon’s legal action against Vista was filed to resolve slamming allegations.

³ Pacific Bell initially filed a lawsuit against Vista alleging fraudulent misrepresentation, which was later settled.

by various local exchange carriers and underlying interexchange carriers during 1997-1999.⁴ Customer complaints may be lodged with a local exchange company, long distance carrier, billing agent or reseller. A PIC dispute is recorded for each telephone line involved in the dispute.

Vista submitted verification tapes at the hearing in support of its claim that all switches in service were independently verified. Vista played these verification tapes for several customers who testified at the hearing. After hearing the verification tapes, all but one of the customers still insisted they did not authorize their service to be switched, and some customers indicated that their conversation with the verifier was terminated when they declined to switch service or asked for clarification about the transaction.

A Presiding Officer's Decision ("POD") was issued in this matter on May 4, 2001. On June 4, 2001, CSD filed an appeal of the POD, alleging several errors in the POD and recommending an increase in fines assessed to Vista. Vista filed a response to CSD's appeal on May 12, 2001.

On September 19, 2001, we issued D.01-09-017. The Decision ordered Vista to cease and desist from engaging in "slamming" (unlawful switches in service) by fraudulent telemarketing solicitation and to pay a fine of \$7.0 million to the General Fund of the State of California within 12 months of the effective date of the Decision. The Decision also granted the application by Communications Billing, Inc. to withdraw the joint application to transfer a portion of its customer base to Thomas M. Coughlin, Sr. and Philip A. Bethune, owners of Vista.

Vista filed a timely application for rehearing of D.01-09-017 on October 19, 2001. No responses have been filed.

⁴ These carriers include Sprint (4,809), MCI WorldCom (3,346), Cable and Wireless (1,685), Pacific Bell (209) and GTE (724).

II. DISCUSSION

In its rehearing application, Vista challenges D.01-09-017 on the following grounds: (1) the Commission no longer has jurisdiction over this proceeding under Public Utilities Code Section 1701.2(d) because the statutory deadline passed before D.01-09-017 was issued; (2) Vista's telemarketers are independent contractors, and any false representations by telemarketers were outside the scope of authorized action on Vista's behalf; (3) Vista complied with Public Utilities Code Section 2889.5 by obtaining third party verifications of long distance service changes; (4) the Commission erred legally and factually by concluding, based on a sample of investigator-selected customers, that every PIC dispute proves a violation of Public Utilities Code Section 2889.5; and (5) the Commission's assessment of a \$7.0 million fine is unreasonable and contrary to evidence submitted by Vista that it lost \$4 million on total revenues of \$40 million. Vista also requests oral argument on its rehearing application.

A. Jurisdiction.

Vista erroneously asserts that the Commission lost jurisdiction over this proceeding under Section 1701.2(d) because the statutory deadline passed before D.01-09-017 was issued. Investigation (I). 99-04-020 was instituted on April 22, 1999. On April 6, 2000, we issued D.00-04-032, which extended the 12-month deadline in the consolidated proceeding in order to accommodate the later schedule of the application. D.01-09-017 was issued on September 19, 2001.

Section 1701.2(d) provides that adjudicatory cases, such as this investigation, shall be resolved with 12 months of initiation unless the Commission makes findings why that deadline cannot be met and issues an order extending that deadline. In D.00-04-032, we expressly found that I.99-04-020 and A.99-09-038 presented overlapping issues and that an extension of the 12-month statutory deadline in I.99-04-020 was necessary to fully consider the implication of the later-filed application. D.00-04-032 extends the statutory deadline until the proceeding is resolved.

Vista's argument that the Commission lost jurisdiction over this proceeding is without merit. Within the 12 months allotted under Section 1701.2(d), we issued D.00-04-032 and extended the statutory deadline until the resolution of the proceeding. Thus, the Commission fully complied with Section 1701.2(d).

B. Liability for Actions of Independent Contractors.

In its rehearing application, Vista asserts that it cannot be held responsible for the fraudulent or negligent actions of its telemarketers because they are independent contractors and because the illegal conduct of the telemarketers falls outside the scope of their assigned duties.

In the regulation of public utilities, entities that are licensed by the Commission to do business within the State of California have regulatory responsibilities and obligations to the public that cannot be avoided by third-party contracts. Section 702 requires all public utilities to "obey and comply with every order, decision, direction, or rule made or prescribed by the commission" and to "do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees." The California Supreme Court has held that Section 702 imposes a non-delegable duty and does not relieve a utility from liability for a contractor's failure to comply with a Commission regulation. (See Snyder v. Southern California Edison Co. (1955) 44 Cal.2d 793, 801-802; Eli v. Murphy (1952) 39 Cal.2d 598, 600; see also Gamboa v. Conti Trucking (1993) 19 Cal.App.4th 663, 666; Klein v. Leatherman (1969) 270 Cal.App.2d 792, 796; Lehman v. Robertson Truck-A-Way (1953) 122 Cal.App.2d 82, 86-87.) Other California courts have held that statutory duties are presumed to be non-delegable. (See, e.g., California Assn. of Health Facilities v. Department of Health Services (1997) 16 Cal.4th 284, 294; Bonner v. Work. Comp. App. Bd. (1990) 225 Cal.App.3d 1023, 1035.)

Vista's argument that it is not responsible for the fraudulent acts of its telemarketers because such acts fall outside the scope of the telemarketers'

assigned duties is similarly without merit. Fraudulent acts committed by an agent are imputed to the principal when the agent deceives a third-party while the agent is functioning in the position provided by the principal. (See California Civil Code § 2338; see also Eamoe v. Big Bear Land & Water Co. (1980) 98 Cal.App.2d 370, 374; Hartong v. Partake, Inc. (1968) 266 Cal.App.2d 942, 960-61; Filippi v. McMartin (1961) 188 Cal.App.2d 135, 138-39.) In other words, when the agent appears to be acting in the ordinary course of his or her duties, the principal is liable for the fraudulent acts.

By virtue of its status as a public utility subject to Commission regulation, Vista incurred regulatory responsibilities and obligations that cannot be avoided by attempting to delegate its duties to third parties. In addition, Vista is responsible for the actions of its telemarketers because Vista affirmatively put these telemarketers in a position that enabled them, while apparently acting within the authority entrusted to them by Vista, to commit fraud and misrepresentation upon third parties. Thus, Vista's claims of legal error are without merit.

C. Third Party Verifications.

Vista contends that it complied with Section 2889.5 by obtaining third party verifications of long distance service changes. Vista is correct in its initial assertion that third party verifications, when properly conducted, are a valid method of ensuring that customers intend to change their service and understand the implications of such service changes.

The evidence submitted by CSD demonstrates that Vista's third party verifications were conducted improperly, and as such the verifications do not constitute a reliable safeguard against unauthorized service changes.⁵ At least one-third of customers interviewed by CSD could not confirm that they were ever contacted to verify a change in their long distance service. The verification tapes demonstrate that the verifier would indicate various purposes for the call, such as

⁵ It should be noted that, even if the verifications were properly conducted, this in no way cures the unlawful and/or fraudulent solicitations perpetrated by Vista's telemarketers in violation of Section 2889.5.

to correct a clerical error, but did not specifically mention that the purpose of the call was to confirm a switch to Vista's service. The verifier would ask whether the customer understood that Vista would be performing long distance service, and if a customer answered "no," they were returned to the telemarketer, who assured them that no switch in service would occur.

We expressly considered all evidence submitted by Vista and CSD on the issue of the verification tapes, and made the following finding of fact:

Vista has a tape, recorded by its third-party verifier, for many business customers complaining of an unlawful switch to Vista's long distance service. After listening to their own verification tape at the hearing, nine of the ten customers testifying still indicated they did not understand or intend to switch their long distance service to Vista. Several customers had their verification terminated when they asked questions. For other customers who asked questions, telemarketers were placed back on the line and assured them that their service would not be switched and they should answer "yes" to all questions.

D.01-09-017, Finding of Fact 11, p. 30.

In sum, there was ample evidence demonstrating that the verifications were in many cases improperly conducted, and as such the verifications do not constitute a valid method of ensuring that customers intended to change their service and understood the implications of such service changes.

D. PIC Disputes.

Vista claims that the Commission erred legally and factually by concluding that every PIC dispute proves a violation of Section 2889.5. This assertion lacks merit because our findings are supported by substantial evidence in light of the entire record.

As noted above, CSD determined that 10,773 PIC disputes were recorded against Vista by various local exchange carriers and underlying

interexchange carriers during 1997-1999, including Sprint, MCI WorldCom, Cable and Wireless, Pacific Bell and GTE. A PIC dispute is recorded for each telephone line involved in the dispute. In reviewing over 100 customer complaints regarding unauthorized service changes, we determined that the testimony of customers at the evidentiary hearing was consistent with all of the written customer statements, and that the individual statements were consistent with each other regarding the method of solicitation and lack of customer intent to switch long distance providers. The complaints reviewed by the Commission were among thousands of PIC disputes lodged against Vista during the same time period. Our investigation showed unauthorized switches in the cases investigated, and we concluded that substantially all of the PIC disputes, if investigated, would reveal the same.

In addition, we found no credible evidence that any LEC's procedure for recording disputes produced inaccurate counts, or that there was any miscommunication of the dispute. We found that there was no proved buyers' remorse or domestic confusion that would negate the dispute, and that all customers who testified continued to allege that they did not intend to switch to Vista's long distance service. We also determined that the customer complaints investigated were representative of the thousands of PIC disputes recorded in the proceeding and accepted the figure of 10,773 as the number of unlawful incidents during the relevant time period.

In reviewing decisions made by constitutionally created agencies, courts generally limit their review to a determination of whether the agency's decision is supported under the substantial evidence test. (Strumsky v. San Diego Co. Emp. Retirement Assn. (1974) 11 Cal.3d 28, 35.) In such cases, the reviewing court does not reweigh the evidence or exercise its independent judgment to draw conclusions from the record. Rather, it renders a determination about whether the agency's conclusions are reasonable and sufficiently supported. Conflicts of evidence are to be resolved in favor of the findings of the administrative agency,

and the fact that evidence is contradicted does not have a bearing on whether that evidence meets the substantial evidence test. (Molina v. Munro (1956) 145 Cal.App.2d 601, 604.) Moreover, if findings are based on inferences reasonably drawn from the record, an administrative order is considered to be supported by substantial evidence in light of the whole record, and it will not be reversed. (See, e.g., Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183, 187; People v. Lane (1956) 144 Cal.App.2d 87, 89.)

In the present case, we drew reasonable evidentiary inferences from the record to support our finding that the customer complaints investigated were representative of the thousands of disputes recorded by various LECs. In deference to Vista's contention of error in calculating total PIC disputes, we authorized fines based upon 7,000 offenses, as compared to the 10,773 offenses calculated by combining all PIC disputes reported by Sprint, MCI WorldCom, Cable and Wireless, Pacific Bell and GTE. Vista's rehearing application primarily challenges the credibility of the evidence of PIC disputes, but such a challenge does not demonstrate that there was not substantial evidence in the record. It only demonstrates that a conflict between contradictory evidence needed to be resolved before we reached our conclusions. Under the substantial evidence standard, it is not error for an agency to resolve conflicts between contradictory evidence one way or another. Accordingly, contrary to Vista's assertion, there is substantial evidence in light of the whole record to support our findings regarding PIC disputes.

E. Fines.

Vista asserts that the assessment of a \$7.0 million fine is unreasonable and contrary to evidence submitted by Vista that it lost \$4 million on total revenues of \$40 million. Under Sections 2107 and 2108, the Commission was authorized to assess a fine from \$500 to \$200,000 for each violation of any order, decision, rule or requirement of the Commission. As noted above, we adjusted the

total number of PIC disputes to reflect Vista's contention of error in calculating total PIC disputes, and assessed fines based upon 7,000 PIC disputes.

CSD recommended a fine of \$12,000 per offense, or a total fine of \$84 million. In analyzing the amount of fines to be assessed, we weighed the factors outlined in D.98-12-075, Appendix B, including the following: 1) the severity of the economic and/or physical harm; 2) the conduct of the utility to prevent, detect, disclose and rectify the violation; 3) the financial resources of the utility; 4) the public interest involved; 5) the totality of the circumstances; and 6) Commission precedents. We noted that voluntary compliance with relevant statutes, rules, regulations and Commission orders was the cornerstone of Commission regulation and found that Vista's conduct warranted a significant fine.

We considered evidence demonstrating that, even after it had notice of misconduct by telemarketers, Vista did not routinely monitor telemarketer solicitations and did not take adequate steps to prevent future violations. On the other hand, we also considered the fact that the telemarketers' misconduct was unauthorized by Vista and that Vista did terminate some offending telemarketers, respond to customer complaints, and issue refunds it concluded were warranted. Based upon this information, we concluded that Vista's preventative and remedial efforts warranted a mitigation of the amount of the fine.

In analyzing Vista's ability to pay a fine, we considered the fact that Vista reported a net loss in 1998 of \$4.6 million, with gross revenues of \$40 million nationwide. Based upon this fact, we deviated from the high end of the fine range and assessed a fine of \$7.0 million, which was near the bottom of the range of permissible fines. Balancing all of the factors outlined in D.98-12-075, and in light of Vista's failure to properly monitor its telemarketers to prevent fraud and misrepresentation, the fine assessed by the Commission is supported by substantial evidence and is reasonable under the circumstances.

F. Oral Argument.

Vista requests an oral argument regarding the issues raised in its application for rehearing. Rule 86.3 of the Commission's Rules of Practice and Procedure specifies that oral argument will be considered if the application "demonstrates that oral argument will materially assist the Commission in resolving the application, and . . . raises issues of major significance for the Commission." (Cal. Code of Regs., Tit. 20, § 86.3.) In this instance, there is ample evidence in the record and transcripts from all parties regarding Vista's conduct and the conduct of its telemarketers. We have a full understanding of the record, and there are no legal issues requiring further briefing, whether oral or in writing. Additionally, there is no finding that we have departed from existing Commission precedent without adequate explanation. Accordingly, Vista's request for oral argument should be denied.

III. CONCLUSION

Rehearing is denied because no legal error has been demonstrated.

IT IS THEREFORE ORDERED THAT:

1. Rehearing of D.01-09-017 is denied.
2. This proceeding is closed.

This order is effective today.

Dated August 22, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners